No. 1342

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

THOMAS BALOGH

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Thomas Balogh petitions this Court for a writ of certiorari. He shows unto the Court as follows:

1. *Opinion of the court below.*

The opinion of the circuit court of appeals has not yet been reported. It appears in the record. [133-138] [1]

2. *Jurisdiction.*

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the

[1] Bracketed figures appearing in this petition refer to pages of printed transcript of record.

Criminal Appeals Rules promulgated by this Court on May 7, 1934.

3. *Timeliness of this petition.*

The judgment of affirmance was rendered and entered April 7, 1947. [133-138] The petition for writ of certiorari is filed within thirty days of that date.

4. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. 301-318) are drawn in question here, as well as sections 622.44, 623.1, 623.2 and 629 of the Selective Service Regulations (32 C. F. R. 601.5 *et seq.*) promulgated by the President under said Act. Additionally Army Regulations 615-500, August 10, 1944, are involved.

5. *Questions presented.*

The *principal* question presented is whether a draft board order, commanding a registrant to report for induction, issued more than ninety days from the date of the preinduction physical examination, is void, entitling petitioner who refused to report for induction to challenge its validity in defense to the indictment charging him with a violation of the Act in failing to comply with the order.

The following *incidental* questions are also presented:

1. Does the Act, as amended on December 5, 1943, making mandatory the preinduction physical examination, require the final determination of physical and mental acceptability of a registrant for training and service by the armed forces as a condition precedent to and before the issuance of the order to report for induction?

2. Is the order, which was issued when the certificate of fitness had expired, and would not have been acceptable to the armed forces because more than ninety days old at

the time of the issuance of the order to report for induction, void so as to excuse petitioner from reporting to undergo a further physical examination as a condition precedent to challenging the validity of the classification given him by the administrative agency?

3. Are the regulations, providing for a physical examination to determine the acceptability of the registrant reporting for induction pursuant to the order, invalid because being in conflict with the Act of Congress requiring the determination of the physical and mental acceptability of a registrant prior to the issuance of the order to report for induction?

4. Is the interpretation placed upon the regulations by the court below *ultra vires* because the court authorized the armed forces to provide for examination to determine acceptability for training and service simultaneously with reporting for induction thereby departing from and conflicting with the Act of Congress?

5. When properly construed, do the Selective Training and Service Act and Regulations thereunder mandatorily require the giving of a preinduction physical examination before the order to report for induction issues, which would be acceptable to the armed forces so as to permit a registrant to exhaust his administrative remedies before the order to report for induction?

6. Do the regulations failing to provide for a preinduction physical examination that will be acceptable for the armed forces when the order to report for induction is issued depart from and conflict with the Act of Congress?

7. Did the taking of the preinduction physical examination, which resulted in petitioner's being declared acceptable for training and service by the armed forces more than ninety days before he was ordered to report for induction, constitute an exhaustion of his administrative remedies sufficient to entitle him to challenge the validity of the classification and proceedings followed by the administrative

agency in denying him his claim for exemption as a minister of religion?

The following *subsidiary* questions arise in event this Court holds that petitioner has exhausted his administrative remedies sufficiently to entitle him to challenge the validity of the denial of his claim for exemption as a minister of religion:

(1) Did the administrative agency illegally consider an advisory recommendation of a theological panel functioning in New York City as a part of the Selective Service System?

(2) Was the advisory recommendation of the theological panel invalid because based upon arbitrary standards, vitiating the entire administrative proceedings?

(3) Did the bias and prejudice possessed by members of the local board vitiate the proceedings before the administrative agency?

Statement of Case

FORM OF ACTION

This criminal action was instituted in the District Court of the United States for the Eastern District of New York, by return of an indictment charging petitioner with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [5-6] The indictment charged that petitioner, a registrant classified for training and service in the armed forces, "did unlawfully, wilfully and knowingly fail and neglect to report for such induction at the time and place fixed". [6]

Thereafter petitioner pleaded "not guilty". [2] The trial to a jury before the court was waived. [7-8, 102] The Government presented its case to the court and rested. At the close of all the evidence, petitioner moved for a dismissal of the indictment and a judgment of acquittal in which the reasons were stated extensively. [37-39, 42-45] Motion was denied by the court. [47] The court rendered

its verdict of guilty on May 2, 1946. [4, 47, 102] Judgment was pronounced thereon on May 23, 1946. [4]

Petitioner duly served and filed his written notice of appeal in the time and manner required by law. [2, 3] The case was duly argued and submitted in the court of appeals on October 8, 1946. [102, 109] On October 31, 1946, the circuit court of appeals reversed the judgment and remanded the cause for a new trial. 157 F. 2d 939. [102-109] The Government filed a petition for rehearing [109-115] which was denied by the court on November 19, 1946. [115-116]

The Government filed petition for writ of certiorari with this Court and the cause was docketed as No. 800, October Term, 1946. Certiorari was granted January 20, 1947, and simultaneously this Court vacated the judgment below and remanded the cause to the circuit court of appeals. (67 S. Ct. 625) Petition for rehearing was filed by Balogh and this Court denied the same on February 3, 1947. (67 S. Ct. 633)

Thereupon Balogh filed a motion for reargument with the circuit court of appeals, which was granted. Briefs were filed and the matter argued and submitted on March 28, 1947. [133] The circuit court of appeals affirmed the conviction on April 7, 1947. [133-138]

FACTS[2]

Thomas Balogh registered with Local Board No. 194 on March 26, 1945. [11, 51-56] On April 2, 1945, the local board mailed him a Selective Service questionnaire. [11] On April 13 he returned the questionnaire properly filled in. [11, 55] The questionnaire showed that he was 18 years

[2] For a more succinct statement of the facts in respect to the history of petitioner's case before the administrative agency in establishing the invalidity of the final classification, see opinion of the Second Circuit Court of Appeals in United States v. Balogh, 157 F. 2d 939.

of age, being born March 25, 1927. It showed that he contributed $400 annually to the support of his mother and family. [51, 53] He showed in the questionnaire that he was a minister of religion, customarily serving as such, having been a minister of Jehovah's witnesses since September 1944. [24, 53-54] In addition, he showed that he was attending the Watchtower divinity school which was established before September 16, 1939, for further study as a student for the ministry. [54] He claimed classification as a minister of religion, which is Class IV-D. [25, 54] With his questionnaire he filed a statement augmenting the questionnaire, in which he stated that he had been engaged in preparatory study for the ministry since 1944. [57] He stated that he did this in order that he might please Almighty God and serve Him with full heart so as to become a more thorough minister of the gospel. [57] He pointed out that the course of study was prescribed by the Watchtower Bible and Tract Society at the meeting place of Jehovah's witnesses. [57] He also showed that during his course of study from time to time he had practical experience in preaching with ministers of the Watchtower Bible and Tract Society who led him in the service. [57] He requested the board to get in touch with the local congregation of Jehovah's witnesses if his proof was not satisfactory to the board. [58]

On April 13, 1945, the questionnaire and statement were examined by the local board, which classified him as liable for training and service, denying his claim for exemption as a minister of religion. [11, 55] Thereafter, on April 16, 1945, he was ordered to report for a preinduction physical examination, pursuant to the Regulations. [11, 55] He reported on April 21 and was found physically and mentally acceptable for training and service in the armed forces. [11, 55] The local board mailed to him a certificate of fitness on April 21, 1945. [55] On April 23, 1945, Balogh requested a hearing before the local board upon the pro-

priety of the denial of his claim for exemption as a minister or student preparing for the ministry. [11, 55] On that date the local board forwarded his entire file to the New York City Headquarters of the Selective Service System "for an opinion by the Advisory Board Theological Panel". [11, 55] On May 3, 1945, Balogh was ordered to appear before the Advisory Board Theological Panel at the Association of the Bar of the City of New York, 42 West 44th Street, New York City, on Wednesday, May 9, 1945, "for a special hearing relative to your eligibility for classification in Class IV-D." [64, 69] On that date he appeared before the Advisory Board Theological Panel. [69] There is nothing to show that he knew who the members of the Panel were. There is nothing to show that any member of the Panel was one of Jehovah's witnesses. [69-74]

At the hearing before the Theological Panel Balogh testified that he was one of Jehovah's witnesses claiming a IV-D classification, although he was not yet a minister. He testified that he expected to become a minister as soon as he finished his study course. [69] The time of the completion of his course was fixed at such time as "I feel I know enough to tell others." [70] He said he began to study in preparation for the ministry in January following his regular attendance at meetings of Jehovah's witnesses in September. Previous to that he had attended meetings with his mother. [70] He testified that one becomes one of Jehovah's witnesses when "he has fully consecrated his life to the will of Jehovah God." [69-74] He said that he had consecrated in September when he started attending the meetings, although he was not baptized until April 29, 1945. [69-70] He said that he was taking a course in Theocratic Ministry and that he would become active as a minister when he had enough knowledge of the Bible to teach and preach. [70] The school in which he was receiving his theological instruction was recognized as a theological seminary a year before the Selective Service. [70-71] He

stated that there were no age limitations for preparation for the ministry. [71] He stated that the school he attended was recognized by the Watchtower Bible and Tract Society, having functioned before September 1939. He showed that he was required to make a commitment to either full time or a greater part of his time in preaching when he applied for admission to the course in Theocratic Ministry. He pointed out that only fifteen of the students were ministers in attendance at the class and ten were not. He showed that he devoted time to the study of the ministry on Tuesday night at home, Thursday at the service meeting, and Sunday *Watchtower* study and witnessing. [71-72] He said that he had not been back-calling. He showed that although attendance was not compulsory, absence from instruction classes was recorded. He stated to the Panel that he claimed as much right to a IV-D classification as "a man who is taking 15 hours of regular classroom instruction in a theological seminary." [72] He showed that in the opinion of Jehovah's witnesses he was taking a full-time course of study in preparing for the ministry. [72-73]

He testified, as shown in his questionnaire [51, 53], that he earned his living by working for the Empire Trust Company 5½ days per week, working 8 hours per day. [73] He showed that the time devoted to study at school and attendance at class was six hours per week, while the ordinary student in religious seminary schools studied fifteen hours per week. [73] The interrogator for the Panel stated: "If there were a man studying at a seminary six hours a week he would not be eligible for IV-D classification for he would not be a full-time student. Do you think it is fair to refuse him a IV-D but grant you one?" To this Balogh replied: "I would like to continue my study without interference and, therefore, I should get a IV-D classification." [73-74] He stated that although he would not have greater authority as a minister upon his graduation, he could be appointed to be a company servant or back-call servant, or

might be given the privilege of calling on people." [74]

The Advisory Panel on Theological Classification made its recommendation on May 9, 1945. [65] The Panel declared that classification as a minister should be confined to "one duly set apart from the body of members to perform special duties." [66] The Panel declared that all of Jehovah's witnesses claim to be ministers. "Those who are set apart for special duties are designated by other titles, for example, company servant, assistant company servant and back-call servant. Not all such special duties are peculiarly religious. Some of them are administrative, such as might be performed by a stock clerk or a superintendent or a sales executive." [66] The Panel then declared that since many persons in the Methodist Book Concern were set apart for special duties who could not claim to be ministers, and since all members of the Quaker churches assumed the religious duties equally, none of them claiming to be ministers, Jehovah's witnesses could not be considered as ministers. [66] The Panel continues in its commentary: "It is a favorite saying among Presbyterians that they are all kings and priests unto God, reference being made to a phrase in the Book of Revelation. It would not be seriously contended, however, that every Presbyterian member is a priest and as such entitled to IV-D classification." The Panel stated that it was necessary to disregard entirely the use of the word "minister" by Jehovah's witnesses and "to study whether he has been set apart from his fellows for special duties and functions, and if so whether those special duties and functions are those of a minister as that word is intended by Congress in the Selective Service Act." [67] "Clearly one of his duties is to preach and teach his religion. That, however, is the duty and practice of all members of the sect; and, therefore, that duty and function in no way sets him apart from the other members." [67] The Panel then declares that "the Local Board should ascertain whether by his own course of life he has become entitled to

a special status—apart from most Jehovah's Witnesses—as a minister by reason of the amount of time he gives to teaching and preaching the religion of his sect and not merely the performance of the administrative duties thereof." [68]

The Panel then concluded that the school where petitioner attended "is not a theological school in the sense in which these words are ordinarily understood and in the sense in which, in our opinion, the statute intended." [68]

"An additional fact of significance is that registrant stated he devoted only six hours per week to these studies. He further stated that there was no regular beginning and ending for any course, that attendance was voluntary and that completion of such course was not essential in order to become a minister or servant." [68] The Panel then concluded that defendant was "not a full-time student preparing for the ministry in a recognized theological or divinity school within the meaning of the statute and the Regulations" and that he was not "a minister of religion in the traditional sense of the term". [68]

On October 23, 1945, the Selective Service New York City Headquarters forwarded to the local board the transcript of petitioner's examination before the Panel, together with the report of the Panel. [76] In its letter of transmittal the members of the Panel were mentioned by name for the first time.[3]

The chairman of the local board suggested that Balogh's file be sent to the Theological Panel for an opinion. [14] The local board considered the report of the Theological Panel in arriving at its decision, according to the clerk of the board. [15, 16] It was stipulated that the draft board

[3] Members of the Panel were Mr. George H. Richards, Dr. David E. Roberts and Rev. James H. Robinson. [76]

consider all the material facts in the file, which included the opinion of the Theological Panel. [18, 19] [4]

Following the return of the file and the report of the Theological Panel, Balogh appeared before the local board on November 5, 1945, for a personal hearing. [55] The board exhibited prejudice to defendant. [77-87] The board reminded him that there were thousands of chaplains serving in the armed forces who were able to follow their religious convictions and he should be able to do the same. [82, 83, 85] [5] He informed the board that the students at the school he attended ranged in age from nine years up to fifty or sixty. He pointed out that although young children attended the school they could not become ministers until after they showed that they had reached the age of discretion. He declared that he was baptized in April 1945, thereby signifying to witnesses that he had consecrated himself to Almighty God as His minister, following which he undertook the course of study in preparation for his ministry. [79-80] Balogh stated that he went out in the service weekly. He showed that he used the procedure of knocking at the doors and telling the people he represented the Watchtower Bible and Tract Society. [84-85] In his house-to-house preaching he made an effort to tell the people about keeping them from committing sin and to take a course that would save their souls. [84] He stated that he

[4] The board of appeal considered the report of the Theological Panel because under the Regulations the board of appeal is bound to consider all the material contained in the registrant's file relative to his status and classification. Reg. 627.24.

[5] It should be observed that one cannot be inducted into the armed forces as a chaplain.

intended to go into the full-time pioneer work in a year or so. [86] *

At the conclusion of the hearing on November 5, 1945, petitioner's classification of I-A was continued. [55, 87] On November 8, 1945, a classification card was mailed. [55] On November 16, 1945, he requested an appeal from such classification. [55, 88] On November 23, 1945, the file was forwarded to the board of appeal. [55] On December 3, 1945, the board of appeal unanimously classified him as liable for training and service, placing him in Class I-A. [56] On December 6, 1945, he was ordered to report for induction on December 18, 1945. He failed and refused to report for induction, writing letters to the local board and to National Headquarters requesting review of his case and postponement of induction. [12, 56, 91-97] This request was denied. [97] On December 18, 1945, he failed to report for induction and was reported to the United States Attorney as a delinquent under the Act. [12, 98] Following this petitioner was indicted for alleged violation of the Act. [5]

Upon the trial he testified on his own behalf. He stated that his father was dead. [19] He testified that he was living with his mother, to whose support he contributed by earnings from his secular work as a bank clerk for the Empire Trust Company, New York City. [19, 20] He stated that his mother had been associated with Jehovah's witnesses since 1937 and that he had become interested in 1942. [20] However, it was not until September 1944, that he decided to enter the ministry as his life's work. [20] He testified that he began to attend regularly the divinity school of Jehovah's witnesses located at 31-90 Steinway Street, Astoria, Long Island, in September 1944. [20-21]

* The greater part of the hearing before the local board was consumed by argumentative and hypothetical questions propounded by the board as to petitioner's beliefs in the Bible and his reasons for not desiring to serve in the armed forces. At the end of the hearing the interrogator for the board accused him of being interested only in "evading service of your country." [87]

He continued his study for the ministry until January 1945, before he began to preach regularly, which regular preaching continued even while he pursued his studies in the school of ministry. [22] He remained in the school of ministry as a student, preparing himself for ultimate full-time missionary evangelistic work 'in a year or two'. He was in the school at the time he registered and at the time he was finally classified, as a student preparing himself for the full-time ministry. He explained the course of study that he pursued in school. Among many other topics the course included Bible research, Bible translation, different kinds of religion, public speaking and study of fundamental doctrines of the Bible advocated by Jehovah's witnesses. [20, 21, 22] He devoted at least six hours weekly to receiving instruction at the school and much more time each week in preparation for study at home. [21, 22] He also preached regularly in the manner required by Jehovah's witnesses, on Sundays, Mondays, Fridays and Saturdays. [22, 23] As he was preparing himself for the full-time ministry in the pursuit of his studies, he also was saving money from his secular work in order to equip himself financially, ultimately to enter the full-time pioneer missionary evangelistic work. [24]

Specifications of Error

The Circuit Court of Appeals for the Second Circuit erred—

(1) in affirming the judgment of conviction;

(2) in failing to order the judgment reversed and the indictment dismissed; and

(3) in failing to reverse the judgment and order a new trial.

Reasons Relied on for Granting the Writ

The decision of the court below conflicts with *Cahoon* v. *United States* (CCA-5) 155 F. 2d 150; *Turner* v. *United States* (CCA-5) 157 F. 2d 520; and *Wells* v. *United States* (CCA-5) 158 F. 2d 932; holding implicitly that the administrative remedies had been exhausted upon the taking of the preinduction physical examination even though given more than ninety days before the order to report for induction was issued.

The decision of the court below is in conflict with the dictum of this Court in *Estep* v. *United States,* where it is said: "We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction. . . . We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency." 327 U.S. 114, 121, 122.

The decision of the court below is in conflict with *Tung* v. *United States* (CCA-1) 142 F. 2d 919. In this connection the court below held that the Army Regulations providing for re-examination upon reporting for induction, where the preinduction physical examination had been given more than ninety days prior to reporting for induction, was in conflict with the Selective Service Regulations. The court below said: "We assume for argument, although it is by no means certain, that by virtue of the Regulation of July 23, 1945, no registrant, whose last examination was more than ninety days old, could be 'ordered to report for induction' until he had been given another examination. If so, the induction order of December 12, 1945, was irregular, and may have deprived Balogh of a privilege which, in theory

at least, might have resulted in his rejection." The court below erroneously attempts to distinguish the *Tung* case. However, there is no difference between the violation of the Act and Regulations in the *Tung* case and the violation of the Act and Regulations in this case. The violation in the one as well as the other constitutes acts in excess of jurisdiction of the administrative agency. The board in the *Balogh* case had no more authority to deny the Act and Regulations than the board in the *Tung* case. The distinction between the case at bar and the *Tung* case is a distinction without a difference. The court below says that "The case at bar is quite different; at worst the order was merely irregular in depriving Balogh of an opportunity which would have been open to redress, had he appeared and demanded it. By absenting himself he abandoned that opportunity." In this connection it should also be observed that had Tung appeared he also would have had the opportunity of being rejected upon a physical examination. Tung by "absenting himself . . . abandoned that opportunity." The rationalization by the court below, whereby the *Tung* case is put aside as being distinguished, is specious. The argument resorted to by the court below is factitious. If there is any distinction between the two cases, it is a distinction without a difference, being inconsequential.

There is an important question of federal law presented in this case which has not been, but which should be, decided by this Court: Do the December 5, 1943, amendment of the Selective Training and Service Act of 1940, as amended (15 Stat. at L. 599) and the Selective Service Regulations, providing for preinduction physical examinations to determine acceptability of a registrant "before he is ordered to report for induction", invalidate Army Regulation 615-500, paragraph 15 (e)? The court below properly held that it did, but improperly concluded that such invalidation did not excuse the petitioner from complying with the order.

The court below went off on a tangent and was led astray by parts of the December 1943 amendment to the Act providing for periodic physical re-examinations. The fact that the Act provided for periodic re-examinations to determine acceptability did not change the fact that the Act requires such periodic re-examinations to be preinduction physical examinations and not physical examinations that follow the issuance of the order to report for induction. It was the clear intention of Congress to provide for the determination of acceptability resulting in the exhaustion of administration remedies before and not after the issuance of the order to report for induction. This was the very purpose of the amendment to the Act.

This interpretation, contended for by the petitioner in the court below and in this Court, is supported by the former regulation of the Selective Service System, which provided while in effect, among other things, that "when a registrant's induction will shortly occur and it appears that the date fixed for his induction will be more than 90 days after the date of his preinduction physical examination, he will be given a new preinduction physical examination before he is ordered for induction unless the Director of Selective Service directs otherwise." This section 629.1 (b) was deleted by Amendment No. 239, July 3, 1944. However, this deletion did not change the preinduction physical examination process provided for by the Regulations, for even after the amendment of July 3, 1944, the Regulations required, and still require, that "Every registrant, *before he is ordered to report for induction, shall be given a preinduction physical examination* under the provisions of this part". (Italics added)

While the army regulation may not of itself be invalid in respect to physical examinations given at the induction station, the fact is that the registrant who refuses to report in order to undergo such physical examination cannot be penalized by the provisions of the army regulation. The

rights of the registrant, in so far as determining whether he has exhausted his administrative remedies or has been illegally deprived of the right to exhaust his administrative remedies by the administrative agency, is determined by the Act of Congress and the Selective Service Regulations and not by the army regulations. *Billings* v. *Truesdell*, 321 U. S. 542, 554-555.

An important question of federal law which has not been, but which should be, decided by this Court is involved in this case. Is the act of an administrative agency, in ordering the petitioner to report for induction before his final physical and mental acceptability had been determined, resulting in the forfeiture and deprivation of his right to exhaust his administrative remedies under the holding of this Court in *Falbo* v. *United States* (320 U. S. 549), such a drastic departure from due process of law as to entitle the petitioner to challenge the order to report for induction as being void?

The decision of the court below, requiring the petitioner to report for induction in order to undergo a physical examination, stretches "the requirement of exhausting the administrative process beyond any reason supporting it." (*Gibson* v. *United States*, 67 S. Ct. 301, 307) The right to re-examination following the issuance of the order to report for induction, being *ultra vires* because of the amendment to the Selective Training and Service Act and the Regulations thereunder, is in effect an optional rehearing which this Court has held unnecessary to resort to as a condition to judicial review of an administrative determination. *Levers* v. *Anderson*, 326 U. S. 219.

For each and every one of these reasons, together with the reasons discussed in the supporting brief, petitioner has shown substantial grounds for the granting of the petition for writ of certiorari hereinafter prayed for.

Conclusion

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Second Circuit directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and your petitioner further prays that the judgment of said Circuit Court of Appeals, affirming the judgment of conviction entered by the district court be here set aside and petitioner dismissed from custody or, in the alternative, the judgment be reversed and the cause remanded for a new trial consistent with this Court's opinion; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

THOMAS BALOGH
Petitioner

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SUPPORTING BRIEF

The Selective Training and Service Act of 1940, as amended (§ 3 a) in part provides. " . . . no man shall be inducted . . . until he is *acceptable* to the land or naval forces . . . and his physical and mental fitness for such training and service has been satisfactorily determined." (Italics added) The administrative process beginning "with registration with the local boards" ends "when the registrant is *accepted* by the Army, Navy or civilian public service camp." *Falbo* v. *United States,* 320 U. S. 549.

Section 629.1 of the Selective Service Regulations provides that "Every registrant, before he is ordered to report for induction, must be given a preinduction physical examination."

The case of this petitioner was originally argued in the court below as a companion case to the case of *Alexander* v. *United States* ex rel. *Kulick,* No. 840, October Term 1946. The *Kulick* case was decided by the court below (*United States* ex rel. *Kulick* v. *Kennedy,* 157 F. 2d 811) two days before the original opinion was filed in the *Balogh* case (157 F. 2d 939). In the *Kulick* case the court below stated that one who had been accepted upon a preinduction physical examination had exhausted his administrative remedies so as to qualify himself to challenge the draft board order in defense to an indictment charging him with failure to report. This is implicit in the following words taken from the opinion in the *Kulick* case: "Moreover, although a number of the decisions could be explained upon the ground that those inducted had not wholly exhausted their administrative remedies [citing *United States* v. *Nelson,* 143 F. 2d 584 (CCA-2)]; in a number of others they had done so and no distinction had been established between the two. Indeed, in *United States* v. *Flakowicz, supra* (146 F. 2d 874), which had been one of these, the Supreme Court denied certiorari only a fortnight before May 12. While

that court has said over and over again that such denials are not to be taken as affirmances, it was not to be expected on May 12, 1945, that the court would grant a writ in precisely the same circumstances in which it had just denied one." (157 F. 2d 811)

Petitioner contends that there is a distinction between this case and the case of *Falbo* v. *United States* (320 U. S. 549) growing out of the amendment of the Act and Regulations requiring a preinduction physical examination and that this Court should refuse to follow the *Falbo* decision because it is not applicable here.

A similar conclusion was reached by Judge J. Joseph Smith of the United States District Court for the District of Connecticut, in *United States* ex rel. *Flakowicz* v. *Alexander,* decided December 4, 1946. In that case Judge Smith said: "In the case at bar, unlike the *Smith* and *Estep* cases (1946) 327 U. S. 114, and the *Kulick* case (CCA-2) October 29, 1946, the petitioner refused to appear at the induction center. In that respect, it is similar to the *Falbo* case. However, at the time of Falbo's refusal to report, final determination of physical fitness and acceptability to the armed forces was made at the induction center following compliance with the order to report for induction. Subsequent to the *Falbo* case, however, the Congress required that final determination of physical fitness and acceptability to the armed forces be made upon request prior to the actual reporting for induction to avoid the hardship incident in the uncertainty of the registrant's future entrance into the armed services until time of actual induction. *Act of December 5, 1943, c. 342, sec. 5, 57 Stat. 599.* It is true that the new requirement of Congress posed some administrative problems and led the Selective Service System to provide for cases in which examination, and determination of fitness, were not followed by induction within a ninety-day period. However, it seems plain that the Congress was attempting, insofar as possible, to provide for the completion of the

administrative determination of fitness and acceptability prior to the date of actual induction, and it would seem that in practically all cases the administrative process was actually terminated upon the issuance of the certificate of fitness. . . . The amendments to the Act and regulations ended the system of final determination of eligibility, and acceptability, at that time and place, and required that it be done at some time prior to the date of induction. . . . [¶] 'All had been done which could be done' by Flakowicz. The date of induction had arrived. True, the language of the *Falbo* and *Billings* cases appears to require actual reporting at the induction center. Yet both cases involved registrants ordered to report under the system in force prior to the Congressional provision of pre-induction physical examinations and the amendment to the regulations to conform to the Congressional directive. . . . [¶] Flakowicz had taken every possible step in the administrative process. On the morning of March 8, 1944, nothing had been done by the board or the director of Selective Service to reopen his classification or postpone his induction. The only function to be performed on that morning was submission to induction. Under those circumstances the Court will not require the empty gesture of reporting and refusing in person, instead of refusing by letter, in order to allow a testing of the legality of the classification." *United States* ex rel. *John Flakowicz* v. *Myrl E. Alexander, Warden,* Judge J. Joseph Smith.[7]

The Fifth Circuit Court of Appeals has held that the certificate of fitness issued upon preinduction physical examination showing acceptance for service by the armed forces constitutes an exhaustion of administrative remedies so as to permit draft board orders to be challenged in de-

[7] This same reasoning and interpretation on the amendment of the Act and regulations was adopted by the Supreme Court in Gibson *v.* United States and Dodez *v.* United States, decided December 23, 1946, 67 S. Ct. 301, 305-306.

fense to indictments charging registrants with failure to report for induction into the armed forces. *Cahoon* v. *United States* (CCA-5), opinion on petition for rehearing, 155 F. 2d 150; *Turner* v. *United States* (CCA-5), decided October 30, 1946; *Garland* v. *United States* (CCA-5), 158 F. 2d 93; *Wells* v. *United States* (CCA-5), decided December 23, 1946.

A contrary view has been taken by the United States Circuit Court of Appeals for the Tenth Circuit in *Hudson* v. *United States*, 157 F. 2d 782.

It is true that the appellant was ordered to report for induction more than 90 days from the date he was given a preinduction physical examination. It is also true under the Army Regulations[8] that a preinduction physical examination more than 90 days old will not be acceptable to the armed forces. But these facts do not require a conclusion that the petitioner had not exhausted his administrative remedies. The acceptance upon the preinduction physical examination given more than 90 days before his order to report for induction makes inapplicable the *Falbo* decision. The reason for this is that the amendment to the Act, passed December 5, 1943, marked the line where the administrative remedies are exhausted at the time the preinduction physical examination is given, which is unaffected by regulations of the armed forces and the Selective Service System which provided that acceptance upon a preinduction physical examination more than 90 days old will not be final. 50 U. S. C. App. 303, 304 (a), 57 Stat. 596, 599.

The purposes of the amendment to the Act cannot be defeated by regulations requiring physical examination simultaneously upon reporting for induction. The amendment to the Act mandatorily required that the certificate of fitness be issued before the order to report for induction was made.

[8] AR 615-500, ¶ 15 (e), relied on by the court below and by respondent.

Prior to the amendment to the Act eliminating the determination of acceptability simultaneously with reporting for induction, a great evil had developed through the interruption of the life and business of thousands if not hundreds of thousands of selectees ordered to report for induction who were discharged as physically unacceptable upon reporting for induction.

When the proposed amendment to the Act was being considered by the United States Senate, the following deliberations were had, as reflected by 89 Congressional Record, pages 8079, 8129-8133:

Mr. BUSHFIELD [South Dakota]:

. . . By way of explanation, let me say that most of the men whose classifications the Senate has been discussing have established homes, businesses, or professions. The record of the Selective Service indicates that forty and a fraction percent of all men called in the United States during the month of August [1943] were deferred because of physical defects. In fairness to the group of men who are about to be called if the proposed legislation is not passed, we should afford them every possible opportunity to ascertain in advance whether they will be accepted; because it will be found that 4 out of every 10 men in the class which is to be called will be returned to their homes as unacceptable. In most cases those men will have either sold their businesses, closed their offices, or lost their jobs; and it is not fair to call them and later return them to their homes, if there is an opportunity to ascertain in advance whether they are acceptable. . . .

. . . Evidently the examination is of little value, because the induction center records show that a fraction over 40 percent of all persons examined at the induction centers are returned to their home as unfit.

I say to the Senate that, inasmuch as we have adopt-

ed the policy, it is unfair to the heads of families to force them to close their offices or give up their jobs before they are ordered to the induction centers. We should do everything possible to avoid the situation of having a man give up his job, but subsequently, because he does not pass the physical examination at the induction center, return to his home and have to look for a new job or have to open up another business.

Mr. CLARK of Missouri:

I think the pending amendment is an extremely meritorious one and certainly should be included in the bill. When I was at home I talked to a great number of draft officials, and the situation the Senator [Bushfield of South Dakota] has mentioned was brought up in a great many instances.

The result is that if a man has a little business or has a home on which he is paying, if he sells his business or tries to dispose of his home before he takes his examination and then is rejected for physical reasons or for any other reasons, he will be out of a job or will have disposed of his home. On the other hand, if he has passed the examination, he has only 3 weeks, in the case of the army, or 1 week, in the case of the Navy, to dispose of his home or business, all of which simply means he gives it away.

Mr. BARKLEY [Kentucky]: Mr. President, I should like to say I think the proposal is meritorious, and should be offered as an amendment to the bill. . . .

Mr. HILL [Alabama]: . . . We certainly ought not to do anything which would make any one examination final.

Much of the argument has been to the effect that insofar as possible the men who are rejected because of physical disabilities ought to be re-examined and taken into the army. . . . There ought not to be a final examination. As I have said, if a man is examined

today, what would that examination be worth 6 months, 9 months, or perhaps a year from now?

Mr. BUSHFIELD: We are all pretty much burdened in this country today, and little more burden on a few doctors in the examining division in the induction centers will not hurt them any more than it hurts the boys who are being called.

Mr. BARKLEY: . . . If they are accepted for induction they go to an induction center and are subjected to a physical examination, under the regulations of the War Department, to determine whether they are fit.

Mr. BUSHFIELD: And 40 percent of them are sent back home.

Mr. BARKLEY: I understand, but if they are found fit, they are inducted.

Mr. BUSHFIELD: That is correct.

Mr. BARKLEY: The examination to determine their fitness takes place before they are inducted. . . . I have had my attention called to cases in which the local draft boards passed men. They went up to their induction centers, were examined, and rejected because of a more or less minor physical defect, which in all probability could be removed within 60 or 90 days, or which might be cured by nature. They were told that they were not fitted at that time to enter the service, and therefore they were not inducted, but they were ordered to report back within 60 days, or told that they would be called back in 60 days or 90 days to determine whether by that time the physical defect had been removed. Under the terms of the Senator's amendment the examination before induction would be final. . . .

Mr. BUSHFIELD: It would be final only in the sense that it is final today, when the man is examined at the induction center and is rejected.

Mr. BARKLEY: It is not final. He may be examined time and time again.

Mr. BUSHFIELD: I know it is not final, because the local board may send him back to the induction center as many times as it sees fit.

We have been extremely solicitous of the welfare of everyone connected with the war effort. It seems to me that the men who are now being taken into the army under the new policy are entitled to a certain leeway if they want it. I ask Senators, in all seriousness, how many of them would be able to wind up their business affairs during 3 weeks. . . .

I do not believe the inductees particularly care whether the examination is a free one. They want an opportunity to know in advance whether they must lose their businesses, or their offices, or their jobs, before they are taken.

Mr. PEPPER [Florida]: That is what I had in mind. That is what all of us wish to see corrected. We wish to provide that a registrant may have as early an examination as it is possible to give him. . . .

Mr. SHIPSTEAD [Minnesota]: I have personal knowledge of several men who have suffered in consequence of the impracticable procedure which has been followed, and I think this is one of the most reasonable provisions that has been offered for inclusion in the bill at any time. . . .

Mr. BARKLEY: Mr. President, . . . I think that at the end of the amendment the words "shall be binding upon such board in the same manner as now followed upon examination after induction" should be changed to read: "Shall be binding upon such board in the same manner as now followed upon examination immediately prior to final induction." The words "immediately prior to final induction" would be substituted for the word "after", which appears in line 10 after the word "examination".

Mr. BUSHFIELD: I accept the suggestion . . .

and ask that the modification in the amendment be made. . . .

Mr. BARKLEY: . . . I should not care to precipitate my examination if I thought I was going to be inducted, unless I was in a hurry to have it done so that I could enter the army. In those cases I suppose the examination would be facilitated, but if I were pretty certain that I could not stand the examination, and still was more or less suspended in mid-air until it was determined, I would naturally want to know what my status was going to be.

Mr. BUSHFIELD: I thank the Senator.

Mr. PEPPER: Mr. President, I should like to ask the Senator if he has in mind that the examination should be final for all time?

Mr. BUSHFIELD: No; no more than at present.

Mr. PEPPER: It is for the particular call?

Mr. BUSHFIELD: Yes.

Mr. PEPPER: So, if he were to be called again the previous examination would not be a finality?

Mr. BUSHFIELD: No, and the Selective Service and the draft boards can send a man back as many times as they want to.

The amendment to the Act, when finally approved by Congress, read as follows:

"Any registrant within the categories herein defined when it appears that his induction will shortly occur shall, upon request, be ordered by his local board in accordance with schedules authorized by the Secretary of War, the Secretary of the Navy, and the Director of Selective Service, to any regularly established induction station for a preinduction physical examination, subject to reexaminations.

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall

be accepted by the local board, subject to periodic reexamination. Those registrants who are classified as I-A at the time of such physical examination and who are found physically qualified for military service as a result thereof, shall remain so classified and report for induction in the regular order." 50 U. S. C. App. 303, 304 (a), 57 Stat. 596, 599.

By Amendment No. 200 (9 F. R. 440-442), effective January 10, 1944, the present procedure for preinduction physical examination was established. See Section 629 of Selective Service Regulations. This procedure for preinduction physical examination by the armed forces was operative for registrants to be inducted into the armed forces. The effect of this change in the Act was recognized by the Court in *Billings* v. *Truesdell,* 321 U. S. 542, 554-555, where the amendment to the Act and Regulations is discussed.

It is manifest that it was the intention of Congress, in providing for the amendment to the Act, to eliminate entirely the practice of determining the final acceptability of a registrant simultaneously with reporting for induction.

The holding of the court below and the argument of the Government in this case perverts entirely the amendment to the Act and Regulations. That construction contended for would restore the evil practice of physical examination to determine acceptability given simultaneously upon reporting for induction. Certainly to allow the determination of final acceptability simultaneously with reporting for induction would be restoring the practice that was condemned by Senator Bushfield and extirpated by the amendment to the Act and Regulations discussed in *Billings* v. *Truesdell,* 321 U. S. 542, 554-555.

Respondent and the court below contend that because petitioner's acceptability had been determined over ninety days prior to his order to report for induction, his examination was void and that he must be re-examined again before induction. They do not cite as authority the Selective

Training and Service Act nor the Selective Service Regulations which govern the local selective service boards, but Army Regulations 615-500, paragraph 15 (e), August 10, 1944.

On July 3, 1944, by Amendment 239, such provision was deleted from the Selective Service Regulations, by revoking section 629.1 (b). That deleted subsection (b) had provided: "The armed forces will not accept the results of a preinduction physical examination after 90 days. Therefore, when a registrant's induction will shortly occur and it appears that the date fixed for his induction will be more than 90 days after the date of his preinduction physical examination, he will be given a new preinduction physical examination before he is ordered for induction unless the Director of Selective Service directs otherwise."

Section 629.1, as of the time that Balogh was ordered to report for induction, merely stated: "Every registrant, *before he is ordered* to report for induction, *shall be given a preinduction physical examination* under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219), (2) he is a delinquent, or (3) he has received a physical examination outside of the United States in accordance with special procedures prescribed by the Director of Selective Service." (Italics added)

It should be observed that the old provision (in Section 629.1 (b)) had absolutely no effect at the time Balogh was ordered to report for induction. It had been deleted almost a year and a half before.

If according to army regulations a preinduction physical examination would not be acceptable to the armed forces after 90 days then it would be the duty of the draft boards to give the registrant another preinduction physical examination rather than order him to report for induction where a physical examination would be given as a part of the process leading up to induction. Indeed Section 629.1, above quoted, mandatorily required that the preinduction physical

examination be given before the registrant is ordered to report for induction. Therefore it must be conclusively presumed that the preinduction physical examination that petitioner received prior to the time he was ordered to report for induction was acceptable to the armed forces.

If this Court reaches the conclusion that the administrative remedies were not exhausted because the preinduction physical examination was more than 90 days old at the time petitioner was ordered to report then counsel says that the judgment of the court below affirming the conviction can be properly reversed upon other grounds. The issuance of the order to report for induction without previously giving petitioner a preinduction physical examination that would be acceptable to the armed forces is an *ultra vires* act in defiance of the amendment to the Act and section 629.1 of the regulations requiring that preinduction physical examinations be given before the order to report issues.

"It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense that it acted beyond its jurisdiction could be interposed in a prosecution under § 11. That case would be comparable to *Tung* v. *United States,* 142 F. 2d 919, where the local board ordered a registrant to report for induction without allowing him the appeal to which he was entitled under the regulations." *Estep* v. *United States,* 327 U. S. 114, 120.

In *Tung* v. *United States,* 142 F. 2d 919, the defendant did not report for induction. Under the Government's argument he had not exhausted his administrative remedies because the order to report was a nullity inasmuch as it was issued in violation of the Act and Regulations. Therefore, for the same reason, it must be held that the order to report in this case is a nullity because it was issued without a preinduction physical examination by the army to finally determine his acceptability, and that it was not necessary for respondent to report. Furthermore, the decisions in

United States v. *Peterson* (DC-ND-Calif.) 53 F. Supp. 760, and *United States* v. *Lair* (DC-ND-Calif.) 52 F. Supp. 312, apply here.

Inasmuch as the order to report for induction was void at the time it was issued, in spite of the fact that petitioner may be held not to have exhausted his administrative remedies, as Tung had failed to do in the *Tung* case, the judgment of the court below should nevertheless be reversed. The reversal of the judgment of the court below can rest on this valid ground, even though the administrative remedies are held not to be exhausted.

Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the assigned errors committed.

Petitioner further prays that the judgment rendered by the circuit court of appeals and the district court against petitioner should be reversed and petitioner discharged or, in the alternative, the judgments should be reversed and a new trial ordered.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioner

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CITATIONS

743366—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1342

THOMAS BALOGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is a continuation of the litigation which was before the Court earlier this Term in *United States* v. *Balogh,* No. 800. It will be recalled that petitioner was convicted in the United States District Court for the Eastern District of New York for having failed to report for induction, in violation of Section 11 of the Selective Training and Service Act of 1942 (50 U. S. C. App., Supp. V, 311). Upon his appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was reversed on the ground that consideration by the classifying boards of an advisory recommendation of the Theological Panel invalidated petitioner's final

classification (see R. 117–123, 124–130). The Government then filed a petition for a writ of certiorari challenging the correctness of the Second Circuit's decision on the ground that by failing to report to the induction station for his final physical examination petitioner failed to exhaust his administrative remedies and he therefore was not entitled to challenge the legality of his classification in the criminal proceeding. Petitioner filed a response to the Government's petition and on January 20, 1947, this Court rendered the following per curiam decision:

> The petition for writ of certiorari is granted. The judgment is vacated and the case remanded to the United States Court of Appeals. *Falbo* v. *United States,* 320 U. S. 549.

On the remand to the circuit court of appeals, the case was again argued, and on April 7, 1947, that court affirmed the judgment of the district court (R. 134–138). The circuit court of appeals held that under the established selective service procedure, petitioner was required to report to the induction station where his final acceptability for military service would have been determined. Since he failed to report, the court concluded that he had not exhausted his administrative remedies and that the defense of illegal classification was not available to him.

The present petition for a writ of certiorari seeks to raise the questions which were before this

Court earlier in the Term upon the petition for certiorari by the Government and which were resolved adversely to petitioner. The same questions were also before the Court at that time in *Cahoon* v. *United States,* No. 183, certiorari denied, October 14, 1946, rehearing denied, January 20, 1947; *Hudson* v. *United States,* No. 887, certiorari denied, February 3, 1947; *Garland* v. *United States,* No. 911, and *Wells* v. *United States,* No. 916, certiorari denied, March 3, 1947; *Turner* v. *United States,* No. 871, certiorari denied, March 3, 1947. The considerations in answer to petitioner's present contentions are fully set forth in our earlier petition for certiorari, as well as in our briefs in opposition filed in the above-cited cases.

Since the present petition for a writ of certiorari is in effect nothing more than a belated second petition for rehearing addressed to this Court's January 20, 1947, decision, it is respectfully submitted that the petition should be denied.

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MAY 1947.

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